IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DAVID DORSEY	:	CIVIL ACTION
	:	
v.	:	
	:	
JOANNE B. BARNHART, COMMISSIONER OF SOCIAL SECURITY	:	
	:	NO. 03-4189

MEMORANDUM AND ORDER

McLaughlin, J. July 22, 2004

The issue in this Social Security case is whether there is substantial evidence for the decision of the Administrative Law Judge ("ALJ") that the plaintiff, David Dorsey, does not meet the criteria of listing § 12.05B for Mental Retardation. The Court held a hearing on the parties' cross Motions for Summary Judgment on May 19, 2004, after which the Court requested supplemental briefing. The Court will now grant in part the plaintiff's Motion for Summary Judgment and remand the case to the Commissioner of Social Security for further proceedings consistent with this Opinion. The Court will deny the defendant's Motion for Summary Judgment.

I. Procedural History

On September 28, 2000, Dorsey protectively filed an application for supplemental security income under Title XVI of

the Social Security Act, as amended. The plaintiff's claim was denied initially on January 16, 2001, and the plaintiff filed a timely request for a hearing. A hearing was scheduled for August 2, 2001, but upon appearance of the plaintiff and his counsel, the matter was continued to have further testing performed on Mr. Dorsey. On January 31, 2002, a hearing was held at which the plaintiff appeared and testified. The ALJ's unfavorable decision was issued on February 8, 2002. The plaintiff appealed that decision to the Appeals Council on March 1, 2002, and the Appeals Council refused review of the ALJ's decision on May 16, 2003. A timely request for review before this Court resulted.

In the first set of briefs filed by the parties in this matter, neither party cited Markle v. Barnhart, 324 F.3d 182 (3d Cir. 2003). Counsel for the plaintiff referred to this case during oral argument and after the hearing, the Court asked for supplemental briefing.

II. Discussion

The plaintiff argues that the ALJ erred when, at step 3 of the sequential evaluation process, he found that the plaintiff's cognitive impairment did not meet or equal listed impairment § 12.05 Mental Retardation that provides:

> Mental retardation refers to significantly sub-average general intellectual functioning with deficits in adaptive functioning initially manifested during the

> developmental period; i.e., the evidence demonstrates or supports onset of the impairment before age 22. The required level of severity for this disorder is met when the requirements in A, B, C, or D are satisfied.
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> A. Mental incapacity evidenced by dependency upon others for personal needs (e.g., toileting, eating, dressing or bathing) and inability to follow directions, such that the use of standardized measures of intellectual functioning is precluded;
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> OR
>
> B. A valid verbal, performance or full scale IQ of 59 or less;
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> OR
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> C. A valid verbal, performance or full scale IQ of 60 through 70 and a physical or other mental impairment imposing an additional and significant work-related limitation of function; . . ..

The plaintiff contends that he fits within § 12.05B because he was found in October of 2001 to have a valid full scale IQ of 59. The ALJ acknowledged that the claimant was found to have a full scale IQ of 59. R. 16-17. The ALJ, however, decided that the evidence in the record did not support deficits in adaptive functioning before the age of 22 or currently, as required by the introductory paragraph of § 12.05.

The Court will start its analysis with Markle, the most recent decision by the Third Circuit on § 12.05. In Markle, the

Court of Appeals considered whether or not there was substantial evidence for the decision of an ALJ that the plaintiff did not meet the criteria of § 12.05C. In that case, the ALJ had decided that the plaintiff had a full scale IQ of greater than 70, although testing reflected that the plaintiff had a full scale IQ of 70. The Court described the requirements of a § 12.05C as follows.

> To meet the requirements of § 12.05C, a claimant must I) have a valid verbal, performance or full scale IQ of 60 through 70, ii) have a physical or other mental impairment imposing additional and significant work-related limitations of function, and iii) show that the mental retardation was initially manifested during the developmental period (before age 22).

Id. at 187.

Although this case requires the Court to interpret 12.05B, and not 12.05C, the framework set out in Markle is helpful to the extent it considers the introductory paragraph of 12.05. The Court of Appeals interprets the introductory paragraph of 12.05 to require a claimant to "show that the mental retardation was initially manifested during the developmental period (before age 22)." Section 12.05B does not contain the additional requirement, that § 12.05C does, of a physical or other mental impairment imposing additional and significant work-related limitations of function.

In order to meet the requirements of 12.05B, therefore, a claimant must have a valid verbal, performance or full scale IQ

of 59 or less and show that the mental retardation was initially manifested during the developmental period (before age 22). There is no dispute that the plaintiff has a full scale IQ of 59. The question is whether there is substantial evidence for the ALJ's conclusion that the plaintiff did not show that the mental retardation was initially manifested during the developmental period. Markle is helpful on this question as well.[1]

The Markle court started its analysis of this issue with a discussion of Williams v. Sullivan, 970 F.2d 1178 (3d Cir. 1992), in which the Court held that the claimant had the burden of establishing that his mental retardation commenced during the developmental period, and, in that case, had failed to meet that burden. The Markle court distinguished its case from Williams because in Williams, there was evidence supporting a finding that the retardation was of recent origin: a long work history; and a traumatic event that might have induced mental retardation at a later stage in life.

In Markle, the Court found evidence that was at least consistent with and, depending on one's interpretation, could be

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[1] The Court of Appeals held that the ALJ's ruling that Markle had a full scale IQ of greater than 70 was not supported by substantial evidence. Because the ALJ did not find that Markle had a sufficiently low IQ to qualify for § 12.05C listed impairment, he did not inquire into the third requirement for such an impairment, namely, whether Markle's mental retardation was initially manifested during his developmental period. The Court of Appeals then went on to discuss this third requirement for § 12.05C.

said to support early onset. This included the fact that Markle took special education courses through 9th grade and struggled to get a GED in the 1970s. He had not held a job for at least fifteen years and his work before that was limited to some painting and wall papering of houses and cutting grass. Because the ALJ had never addressed the date of onset, the Court remanded to the Agency for it to address this issue in the first instance. It noted that "the ALJ may well believe on remand that he should develop the record further – as is his duty – and inquire further into the nature of Markle's special education, or obtain an expert opinion as to the likely onset of the retardation." Id. at 189.

The question before this Court is whether this case is more like Markle or Williams. The Court concludes that it is closer to Markle, and therefore, will remand to the ALJ. One major difference from Williams is that there is no evidence here of any traumatic event that might have induced mental retardation at a later stage of life. Nor is Dorsey's work history as substantial as Williams was.

Dorsey's jobs were few and far between and involved light manual labor. The plaintiff worked as a plumber's helper in 1986, 1987, and 1989. His job consisted of lifting pipes and moving pipes for the plumbers and also digging holes. He worked for two years picking up trash and cleaning up. The plaintiff

testified that the last job he had held had been in the year 2000 at Independence Apparel. Someone had helped him get this job. He lost the job because the company closed for repairs, but when they reopened, they did not bring him back. He had been looking unsuccessfully for any kind of work since he lost the job at Independence Apparel. Most of the jobs he had gotten were through the help of friends. He was not very good at acquiring jobs by himself.

As in Markle, there was evidence of onset before age 22. The plaintiff testified that he attended special education classes through the sixth grade. The plaintiff was not sure why some of his records showed that he had attended eighth grade. He testified that he left school after the sixth grade because he was not thinking clearly.

The ALJ rejected the plaintiff's testimony that he was in special education because there was nothing in the record to confirm that statement. But that statement is entirely consistent with an IQ of 59 and with other evidence that the ALJ apparently accepted. Someone had to pick out clothes for the plaintiff to wear and cut his hair. He lived at a recovery house for former drug and alcohol abusers, although he had been drug-free since February, 1999. All of these factors point to continuing deficits in adaptive functioning.

The Court concludes that there is not substantial evidence for the ALJ's conclusion that the plaintiff did not show that the mental retardation was initially manifested during the developmental period. The Court, therefore, will remand to the ALJ for further proceedings consistent with this Opinion. As the Court of Appeals suggested in Markle, the ALJ may want to develop the record further by exploring the nature of Dorsey's earlier education or by obtaining an expert opinion as to the likely onset of the retardation.

An appropriate order follows.

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ORDER

AND NOW, this 22nd day of July, 2004, upon consideration of plaintiff's motion for summary judgment (Docket No. 11), defendant's motion for summary judgment (Docket No. 14), the parties' supplemental memoranda, and after hearing on May 19, 2004, IT IS HEREBY ORDERED that plaintiff's motion for summary judgment is GRANTED in part in that the case is remanded back to the Commissioner for further proceedings consistent with this Opinion.

IT IS FURTHER ORDERED that defendant's motion for summary judgment is DENIED.

BY THE COURT:

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MARY A. McLAUGHLIN, J.